



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Recusal Statement

FROM: Adam Gustafson
Deputy General Counsel

TO: Matthew Z. Leopold
General Counsel

Adam Gustafson 6/2/2020

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligation to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own attorney bar obligations.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am prohibited from participating in any particular matter involving specific parties in which my former employer, **Boyden Gray & Associates PLLC**, or any former client to whom I provided legal services during the past two years prior to my joining federal service, is a party or represents a party. Under the terms of the Ethics Pledge, this recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term “particular matters involving specific parties” is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term “open to all interested parties” means that the meeting should include a multiplicity of parties. If, for example, there is “a meeting with five or more stakeholders regarding a given policy or piece of legislation, [then I] could attend such a meeting even if one of the stakeholders is a former employer or former client.”¹ Should a question arise as to whether a specific forum qualifies as “open to all interested parties,” then I will consult with OGC/Ethics.

Because I was a federally registered lobbyist within the two years prior to my appointment, I understand that I am also subject to the provisions of Section 1, Paragraph 7 of the Executive Order. For a period of two years after the date of my appointment, I will not participate in any particular matter on which I lobbied in the preceding two years, nor will I participate in the specific issue area in which that particular matter falls. I am advised by OGC/Ethics that Section 1, Paragraph 7 applies to both “particular matters involving specific parties” and “particular matters of general applicability,” but not the broader term, “matters” as used in 18 U.S.C. § 207(c), or broad policy areas (e.g., “ethanol”).² I understand that I am not recused from working on these broad policy areas. However, to the extent that these broader “matters” arise in specific party matters such as litigation or an enforcement action in which my former employer or any former client is a party, then I understand that pursuant to Section 1, Paragraph 6, I am recused from participating in such specific party matters for two years from my appointment date.

Set forth below are my former clients identified in consultation with OGC/Ethics that have or may have environmental issues that could potentially arise with respect to my duties here at EPA,³ as well as the specific issue areas from which I am recused:

¹ See Office of Government Ethics (OGE) Advisory DO-09-011 (3/26/09), which applies to Exec. Order 13770 pursuant to OGE Legal Advisory LA-17-03 (3/20/17).

² See OGE Legal Advisory LA-17-03 (March 20, 2017), which defines “specific issue area” to mean a “particular matter of general applicability,” which is a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties. See also 5 C.F.R. § 2640.102(l)-(m) (defining “particular matter involving specific parties” and “particular matter of general applicability”); OGE DO-06-029 (Oct. 4, 2006) (defining “matter”).

³ For any former client that is not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations.

RECUSAL LIST PURSUANT TO EXECUTIVE ORDER 13770
In effect until March 29, 2022

FORMER EMPLOYER: Boyden Gray & Associates PLLC

FORMER CLIENTS:

Competitive Enterprise Institute
Corn Oil One
Energy Future Coalition
Farmers Educational & Cooperative Union of
America d/b/a National Farmers Union
Farmers Union Enterprises
Illinois Corn Growers Association

Iowa Corn Growers Association
Missouri Corn Growers Association
Palantir Technologies Inc.
Renewable Fuels Association
Southeastern Legal Foundation
Urban Air Initiative
60 Plus Association

FORMER LOBBYING ISSUE AREAS:

Alternative new-vehicle certification fuel pursuant to 40 C.F.R. § 1065.701(c) or § 86.113-94(g)
F-factor for fuel flex vehicles
Minimum octane standard for motor vehicle fuel
Modifications to Fuel Regulations to Provide Flexibility for E15 and to Elements of the Renewable
Identification Number Compliance System
MOtor Vehicle Emissions Simulator Model (MOVES 2014) and the EPA/V2/E-89 fuel effects study
Renewable Fuels Standards (RFS) program, including but not limited to the Triennial Biofuels Report
to Congress, Reset Rule (RIN 2060 AU28), and reallocation of small refinery exemptions under
40 C.F.R. § 80.1405
Safer Affordable Fuel Efficient (SAFE) Vehicles Rule
Treatment of ethanol in carbon-related exhaust emission (CREE) formula for measuring compliance
with greenhouse gas standards
Vehicle Test Procedure Adjustments for Tier 3 Test Fuel

ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Thus, I will not participate in the following matters:

CASE NAME and/or SUBJECT MATTER:	CITATION and/or DESCRIPTION:
<i>Sierra Club v. Wheeler</i>	No. 17-2174 (D.D.C.), Docket ID No. EPA-HQ-OGC-2018-0818 (anti-backsliding study delay)
<i>Urban Air Initiative v. EPA</i>	No. 19-1162 (D.C. Cir.) (E15 Rule), consolidated with <i>AFPM v. EPA</i> , No. 19-1124 (D.C. Cir.)
<i>American Fuel & Petrochemical Mfrs. v. EPA</i>	No. 19-1124 (D.C. Cir.) (E15 Rule)
<i>Urban Air Initiative v. EPA</i>	Nos. 19-1161, 20-1004 (D.C. Cir.) (Tier 3 Rule in connection with E15 Rule)
<i>Urban Air Initiative v. EPA</i>	No. 15-1333 (D.C.C.) (FOIA concerning EPAct Study)

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above, I have asked David Fotouhi, Principal Deputy General Counsel, and Kamila Lis-Coghlan, Deputy General Counsel, to assist in screening EPA matters directed to my attention that involve those entities. All inquiries and comments involving the entities on my recusal list should be directed to David and Kamila without my knowledge or involvement.

If David or Kamila determines that a particular matter will directly involve any of the entities listed on my recusal list, then they will take action or refer it for action or assignment to another, without my knowledge or involvement. In the event that they are unsure whether an issue is a particular matter from which I am recused, then they will consult with OGC/Ethics for a determination.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my screening arrangement, I will provide a copy of the revised recusal statement to you and OGC/Ethics.

cc: David Fotouhi, Principal Deputy General Counsel
Elise Packard, Deputy General Counsel for Operations
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices
Kamila Lis-Coghlan, Deputy General Counsel
Ariadne Goerke, Acting Associate Deputy General Counsel
Justina Fugh, Director, Ethics Office
OGC Associate General Counsels and Directors
Regional Counsels



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Updated Recusal Statement

FROM: Adam Gustafson
Deputy General Counsel

Adam Gustafson 6/22/2020

TO: Matthew Z. Leopold
General Counsel

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligation to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own attorney bar obligations. This recusal statement supersedes my June 2, 2020 recusal statement and updates my ethics obligations with respect to one of my former clients, Competitive Enterprise Institute.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am prohibited from participating in any particular matter involving specific parties in which my former employer, **Boyden Gray & Associates PLLC**, or any former client to whom I provided legal services during the past two years prior to my joining federal service, is a party or represents a party. Under the terms of the Ethics Pledge, this recusal lasts for two years from the date that I joined federal service.

On June 17, 2020, the White House granted me a limited waiver of the provisions of Section 1, Paragraph 6, for one of my former clients, the Competitive Enterprise Institute (CEI). This waiver permits me to participate in specific party matters in which CEI is a party, provided that I was not previously involved in that matter. To address my "covered relationship" with CEI under the federal impartiality standards, EPA's Designated Agency Ethics Official issued me an impartiality determination on that same day. *See* attachments. I am now authorized to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.) and any other potential cases arising at EPA in which my former client, CEI, is a party, provided that I did not previously participate personally and substantially in that same matter for CEI or any other party. I may participate personally and substantially, including meetings or communications related to such cases even if CEI is present. But I understand that I must remain recused from any specific party matters in which my former client is a party if I participated personally and substantially previously.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means that the meeting should include a multiplicity of parties. If, for example, there is "a meeting with five or more stakeholders regarding a given policy or piece of legislation, [then I] could attend such a meeting even if one of the stakeholders is a former employer or former client."¹ Should a question arise as to whether a specific forum qualifies as "open to all interested parties," then I will consult with OGC/Ethics.

Because I was a federally registered lobbyist within the two years prior to my appointment, I understand that I am also subject to the provisions of Section 1, Paragraph 7 of the Executive Order. For a period of two years after the date of my appointment, I will not participate in any particular matter on which I lobbied in the preceding two years, nor will I participate in the specific issue area in which that particular matter falls. I am advised by OGC/Ethics that Section 1, Paragraph 7 applies to both "particular matters involving specific parties" and "particular matters of general applicability," but not the broader term, "matters" as

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used in 18 U.S.C. § 207(c), or broad policy areas (e.g., “ethanol”).² I understand that I am not recused from working on these broad policy areas. However, to the extent that these broader “matters” arise in specific party matters such as litigation or an enforcement action in which my former employer or any former client is a party, then I understand that pursuant to Section 1, Paragraph 6, I am recused from participating in such specific party matters for two years from my appointment date.

Set forth below are my former clients identified in consultation with OGC/Ethics that have or may have environmental issues that could potentially arise with respect to my duties here at EPA,³ as well as the specific issue areas from which I am recused:

RECUSAL LIST PURSUANT TO EXECUTIVE ORDER 13770 In effect until March 29, 2022	
FORMER EMPLOYER: Boyden Gray & Associates PLLC	
FORMER CLIENTS: ⁴	
Corn Oil One Energy Future Coalition Farmers Educational & Cooperative Union of America d/b/a National Farmers Union Farmers Union Enterprises Illinois Corn Growers Association Iowa Corn Growers Association	Missouri Corn Growers Association Palantir Technologies Inc. Renewable Fuels Association Southeastern Legal Foundation Urban Air Initiative 60 Plus Association

² See OGE Legal Advisory LA-17-03 (March 20, 2017), which defines “specific issue area” to mean a “particular matter of general applicability,” which is a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties. See also 5 C.F.R. § 2640.102(l)-(m) (defining “particular matter involving specific parties” and “particular matter of general applicability”); OGE DO-06-029 (Oct. 4, 2006) (defining “matter”).

³ For any former client that is not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations.

⁴ Competitive Enterprise Institute (CEI) is not included here as a “former client” because of the June 17, 2020 pledge waiver and impartiality determination I received. I was, however, recused from participating in specific party matters in which CEI was a party from my entry into EPA until June 17, 2020, and I remain recused from any specific party matters in which CEI is a party if I participated personally and substantially previously in that same matter.

FORMER LOBBYING ISSUE AREAS:

Alternative new-vehicle certification fuel pursuant to 40 C.F.R. § 1065.701(c) or § 86.113-94(g)
F-factor for fuel flex vehicles
Minimum octane standard for motor vehicle fuel
Modifications to Fuel Regulations to Provide Flexibility for E15 and to Elements of the Renewable Identification Number Compliance System
Motor Vehicle Emissions Simulator Model (MOVES 2014) and the EPA/V2/E-89 fuel effects study
Renewable Fuels Standards (RFS) program, including but not limited to the Triennial Biofuels Report to Congress, Reset Rule (RIN 2060 AU28), and reallocation of small refinery exemptions under 40 C.F.R. § 80.1405
Safer Affordable Fuel Efficient (SAFE) Vehicles Rule
Treatment of ethanol in carbon-related exhaust emission (CREE) formula for measuring compliance with greenhouse gas standards
Vehicle Test Procedure Adjustments for Tier 3 Test Fuel

ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Thus, I will not participate in the following matters:

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<i>American Fuel & Petrochemical Mfrs. v. EPA</i>	No. 19-1124 (D.C. Cir.) (E15 Rule)
<i>Urban Air Initiative v. EPA</i>	Nos. 19-1161, 20-1004 (D.C. Cir.) (Tier 3 Rule in connection with E15 Rule)
<i>Urban Air Initiative v. EPA</i>	No. 15-1333 (D.C.C.) (FOIA concerning EPA Study)

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above, I have asked David Fotouhi, Principal Deputy General Counsel, and Kamila Lis-Coghlan, Deputy General Counsel, to assist in screening EPA matters directed to my attention that involve

those entities. All inquiries and comments involving the entities on my recusal list should be directed to David and Kamila without my knowledge or involvement.

If David or Kamila determines that a particular matter will directly involve any of the entities listed on my recusal list, then they will take action or refer it for action or assignment to another, without my knowledge or involvement. In the event that they are unsure whether an issue is a particular matter from which I am recused, then they will consult with OGC/Ethics for a determination.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my screening arrangement, I will provide a copy of the revised recusal statement to you and OGC/Ethics.

Attachments

cc: David Fotouhi, Principal Deputy General Counsel
Elise Packard, Deputy General Counsel for Operations
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices
Kamila Lis-Coghlán, Deputy General Counsel
Ariadne Goerke, Acting Associate Deputy General Counsel
Justina Fugh, Director, Ethics Office
OGC Associate General Counsels and Directors
Regional Counsels



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

June 17, 2020

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the Competitive Enterprise Institute

FROM: James Payne
Designated Agency Ethics Official and
Deputy General Counsel for Environmental Media and Regional Law Offices

TO: Adam Gustafson
Deputy General Counsel

Prior to entering federal service on March 29, 2020, you were a partner at Boyden Gray & Associates, providing legal and lobbying services to a variety of clients. Now, as Deputy General Counsel of the United States Environmental Protection Agency (EPA), you seek to participate in specific party matters in which one of your former clients, the Competitive Enterprise Institute (CEI), is a party, provided that you did not yourself work personally and substantially on that same matter. You have received a waiver from the White House Counsel's office and now seek an impartiality determination from me. Your request is granted.

BACKGROUND

The previous Administration issued the Clean Power Plan (CPP) on October 23, 2015, and it was quickly challenged by numerous entities. *See State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir.). The 2015 CPP was then stayed by the U.S. Supreme Court, keeping it from going into effect. On October 10, 2017, following a review as directed by President Trump's Energy Independence Executive Order, EPA proposed to repeal the 2015 CPP.

After determining that the 2015 CPP exceeded EPA's statutory authority under the Clean Air Act, the EPA proposed the Affordable Clean Energy (ACE) Rule on August 21, 2018, to reduce greenhouse gas emission from existing coal-fired electric utility generating units and power plants. This new rule, finalized on June 19, 2019, replaces the 2015 CPP and establishes emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants. The ACE Rule was also challenged, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.). You, however, did not participate in this litigation on behalf of CEI or any other client.

NEED FOR A PLEDGE WAIVER

Pursuant to Executive Order 13770, you signed the Ethics Pledge and are prohibited from participating in specific party matters in which your former employer or former client is a party or represents a party. Given the Agency's interest in having your participation in the ACE litigation, the EPA sought a waiver of the provisions of Section 1, paragraph 6 of the Ethics Pledge on your behalf. This waiver, which was granted on June 17, 2020, authorizes you to participate personally and substantially in the *American Lung Association* litigation and any other potential cases arising at EPA in which your former client, CEI, is a party, provided that you did not previously participate personally and substantially in that same matter for CEI or any other party. *See* attachment.

NEED FOR IMPARTIALITY DETERMINATION

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, Subpart E, "Impartiality in Performing Official Duty." For one year from the date you last provided services to CEI, you have a "covered relationship" with them pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). Absent an impartiality determination from me, you still cannot participate in any specific party matter in which CEI is a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that EPA takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy General Counsel in specific party matters in which CEI is a party, provided that you did not participate personally and substantially in the matter previously with CEI or any other party. In making this determination to enable you to effectively carry out your duties as Deputy General Counsel and to advance the interests of the Agency, I have taken the following factors into consideration:

Nature of the relationship involved – A graduate of the University of Virginia and Yale Law School, you clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, you were an associate at Cooper & Kirk where you specialized in appellate litigation. While at Boyden Gray & Associates, you represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act (CAA) matters. You have argued CAA appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on CAA regulations. Through this work, you have gained extensive experience in CAA regulations and litigation.

During the year prior to your federal appointment, you provided legal services to CEI and represented this entity in the litigation related to EPA's 2015 CPP. Those proceedings were dismissed shortly after EPA finalized the ACE Rule in 2019. Of importance is that your Clean Air Act-related representation of CEI was limited to the CPP litigation (*West Virginia v. EPA*), and neither you nor your former firm provided legal services to CEI regarding the ACE Rule or related litigation (*American Lung Association v. EPA*).

Effect of the matter upon your financial interest – You have no continuing financial interest with CEI, nor do you have any financial interest in the outcome of this case.

Nature and importance of the employee's role – In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in court challenges to agency actions. In the position of Deputy General Counsel, you must be able to provide legal counsel and vital input into the Agency's defense of such challenges, including the ACE Rule litigation. Your invaluable knowledge and experience with Clean Air Act regulations and litigation are of great importance in advocating the interests of the Agency in defending the ACE Rule and advising the Administrator and senior leadership, especially given the recent departure of OGC's previous political appointee in the role of Deputy General Counsel specializing in the CAA.

Sensitivity of the matter – The ACE Rule empowers states to continue to reduce emissions while providing affordable and reliable energy for all Americans. Your participation in this important specific party matter, including decisions the Agency makes to defend the ACE Rule, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

Difficulty of reassigning the matter to another employee – Your expertise and comprehensive understanding of CAA regulations and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. You were hired because of your extensive CAA expertise which is needed to counsel and advise the EPA Administrator and senior leadership on behalf of the Agency, including for this case which is particularly important to the priorities of the Administration.

Under this limited authorization, you may participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.). There could potentially be other

specific party matters involving CEI in which your expertise is needed for similar reasons as described above. Thus, this authorization permits you to participate in other specific party matters in which CEI is a party provided that you did not previously participate personally and substantially while serving as an attorney for CEI or any other party. You will be allowed to participate in these specific party matters, including meetings or communications related to such cases even if CEI is present. But you must remain recused from those specific party matters in which your former client is a party if you participated personally and substantially previously. You will otherwise fully comply with the remainder of the requirements imposed by the President's Ethics Pledge and with all applicable federal ethics laws and regulations, as well as your own attorney bar obligations.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Shannon Griffo or Justina Fugh of OGC/Ethics or me.

Attachment

cc: Matthew Z. Leopold, General Counsel
David Fotouhi, Principal Deputy General Counsel
Elise Packard, Deputy General Counsel for Operations
Kamila Lis-Coghlan, Deputy General Counsel
Ariadne Goerke, Acting Associate Deputy General Counsel
Justina Fugh, Director, Ethics Office



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Request for a Limited Waiver from Section 1, Paragraph 6 of Executive Order 13770

FROM: James Payne *JP 6-8-20*
Deputy General Counsel for Environmental Media and Regional Law Offices,
and Designated Agency Ethics Official

THROUGH: Mandy M. Gunasekara *mg 6/8/20*
Chief of Staff

TO: Scott F. Gast
Senior Counsel and Special Assistant to the President
The White House

This memorandum requests a limited waiver from Section 1, paragraph 6 of Executive Order 13770 (January 28, 2017) (Ethics Pledge) for Adam Gustafson, Deputy General Counsel, at the United States Environmental Protection Agency (EPA). Prior to his appointment as Deputy General Counsel, Mr. Gustafson was a partner at Boyden Gray & Associates and a federally registered lobbyist. EPA is not requesting any waiver regarding Mr. Gustafson's prior lobbying activities. Mr. Gustafson began service at EPA on March 29, 2020 and received his initial ethics training on April 1, 2020.

EPA requests this limited waiver to allow Mr. Gustafson to participate in specific party matters, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), notwithstanding a particular former client, the Competitive Enterprise Institute (CEI), being a party. The limited waiver will allow Mr. Gustafson to participate in specific party matters in which CEI is a party, provided he did not participate personally and substantially in the matter previously with CEI or any other party.

The *American Lung Association* litigation challenges EPA's 2019 Affordable Clean Energy Rule, which replaces EPA's 2015 Clean Power Plan and establishes emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants. Mr. Gustafson did not previously participate in this litigation on behalf of CEI or any

other client. His expertise and comprehensive understanding of Clean Air Act (CAA) regulation and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. Mr. Gustafson was hired because of his extensive CAA expertise. He will abide by the rest of the Ethics Pledge obligations. Mr. Gustafson's expertise is needed to counsel and advise the Administrator and senior leadership on behalf of the Agency, including for this case which is particularly important to the priorities of the Administration.

BACKGROUND

On January 28, 2017, President Trump signed Executive Order 13770, "Ethics Commitments by Executive Branch Appointees," which includes an Ethics Pledge. The Ethics Pledge imposes ethic requirements beyond federal ethics laws and regulations and attorney bar obligations. All individuals appointed to political positions on or after January 20, 2017 are required to sign the Ethics Pledge, which sets forth the "former client"¹ restriction at Section 1, paragraph 6:

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

Mr. Gustafson signed the Ethics Pledge on April 10, 2020. Thus, Mr. Gustafson would require a waiver to work on any particular matter involving a former client such as the Competitive Enterprise Institute. Section 3 of Executive Order 13770 allows the President or his designee to grant a waiver of any restriction contained in the Ethics Pledge.

AFFORDABLE CLEAN ENERGY (ACE) RULE LITIGATION

The previous Administration issued the Clean Power Plan (CPP) on October 23, 2015, and it was quickly challenged by numerous entities. *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir.). The 2015 CPP was then stayed by the U.S. Supreme Court, keeping it from going into effect. On October 10, 2017, following a review as directed by President Trump's Energy Independence Executive Order, EPA proposed to repeal the 2015 CPP.

After determining that the 2015 CPP exceeded EPA's statutory authority under the Clean Air Act, EPA proposed the Affordable Clean Energy (ACE) Rule on August 21, 2018, to reduce greenhouse gas emission from existing coal-fired electric utility generating units and power plants. This new rule, finalized on June 19, 2019, replaces the 2015 CPP and establishes emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants. The ACE Rule was also challenged in suits by a number of parties. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.). Mr. Gustafson did not participate in this litigation on behalf of CEI or any other client.

¹ A "former client" is defined as "any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service provided was limited to a speech or similar appearance. It does not include clients of the appointee's former employer to whom the appointee did not personally provide services." Executive Order 13770, Section 2(i).

ANALYSIS

A graduate of the University of Virginia and Yale Law School, Mr. Gustafson clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, he was an associate at Cooper & Kirk where he specialized in appellate litigation. While at Boyden Gray & Associates, Mr. Gustafson represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act matters. He has argued Clean Air Act appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on Clean Air Act regulation. Through this work, Mr. Gustafson gained extensive experience in CAA regulation and litigation.

During the two-year period prior to his federal appointment, Mr. Gustafson provided legal services to the Competitive Enterprise Institute and represented this entity in the litigation related to EPA's 2015 CPP. Those proceedings were dismissed shortly after EPA finalized the ACE Rule in 2019. Of importance is that Mr. Gustafson's Clean Air Act-related representation of CEI was limited to the CPP litigation (*West Virginia v. EPA*), and neither he nor his former firm provided legal services to CEI regarding the ACE Rule or related litigation (*American Lung Association v. EPA*).

In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in court challenges to agency actions. In the position of Deputy General Counsel, Mr. Gustafson must be able to provide legal counsel and vital input into the Agency's defense of such challenges, including the ACE Rule litigation. His invaluable knowledge and experience with Clean Air Act regulation and litigation are of great importance in advocating the interests of the Agency in defending the ACE Rule and advising the General Counsel and Administrator, especially given the recent departure of OGC's previous political appointee in the role of Deputy General Counsel specializing in the CAA. Consistent with paragraph 6 of the Ethics Pledge, to date Mr. Gustafson has not participated in the ACE Rule litigation while at EPA because his former client CEI is one of a number of parties to this litigation. He has no continuing financial interest with CEI, nor does he have any financial interest in the outcome of this case.

The ACE Rule empowers states to continue to reduce emissions while providing affordable and reliable energy for all Americans. Mr. Gustafson's participation in this important specific party matter, including decisions the Agency makes to defend the ACE Rule, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

REQUEST FOR A LIMITED WAIVER

For the reasons set forth above, EPA respectfully requests a limited waiver of the provisions of Section 1, paragraph 6 of the Executive Order to enable Adam Gustafson to effectively carry out his duties as Deputy General Counsel and to advance the interests of the Agency. Although a main focus of this waiver request is *American Lung Association v. EPA*,

No. 19-1140 (D.C. Cir.), there could potentially be other specific party matters involving CEI where Mr. Gustafson's expertise is needed for similar reasons as described above. Thus, this request also encompasses any such cases arising at EPA where CEI is a party and Mr. Gustafson did not previously participate personally and substantially while serving as an attorney for CEI or any other party. If granted, Mr. Gustafson would be allowed to participate in those specific party matters, including meetings or communications related to such cases where CEI is present. However, he will remain recused from those specific party matters in which his former client is a party if he had himself participated personally and substantially previously. He will otherwise fully comply with the requirements imposed by the President's Ethics Pledge (including Section 1, paragraph 7) and with all applicable federal ethics laws and regulations, as well as his own attorney bar obligations.

Please feel free to contact the EPA Chief of Staff, Mandy Gunasekara, at (202) 564-6999 or Gunasekara.Mandy@epa.gov, or me at (202) 564-0212 or Payne.James@epa.gov if you have any questions.

MEMORANDUM

TO: JAMES PAYNE
DEPUTY GENERAL COUNSEL FOR ENVIRONMENTAL MEDIA AND
REGIONAL LAW OFFICES, AND
DESIGNATED AGENCY ETHICS OFFICIAL
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FROM: SCOTT F. GAST
DEPUTY COUNSEL AND DEPUTY ASSISTANT TO THE PRESIDENT
THE WHITE HOUSE

DATE: June 17, 2020

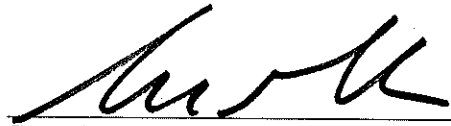
SUBJECT: Limited Waiver of Section 1, Paragraph 6 of Executive Order 13770

Official: Adam Gustafson
Deputy General Counsel
United States Environmental Protection Agency

After reviewing your limited waiver request memorandum, I hereby provide a limited waiver of the requirements of Section 1, paragraph 6 of Executive Order 13770 to Mr. Adam Gustafson to allow him to participate in specific party matters, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), despite the involvement of his former client, the Competitive Enterprise Institute (CEI). I have determined that it is in the public interest to grant this limited waiver because of Mr. Gustafson's extensive experience in Clean Air Act regulation and litigation, the fact that he did not previously participate in the *American Lung Association* litigation, and the importance of his involvement in this specific party matter to assist with the Administration's defense of the Affordable Clean Energy (ACE) Rule.

In light of the importance of the aforementioned efforts to the Trump Administration and to the United States Environmental Protection Agency, a limited waiver of the provisions of paragraph 6 of the Ethics Pledge (contained in Section 1 of Executive Order 13770) is justified for Mr. Gustafson so that he can effectively carry out his duties as Deputy General Counsel and ably advise the EPA Administrator and senior leadership. Accordingly, I authorize Adam Gustafson to be able to participate personally and substantially in *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), and any other potential cases arising at EPA where CEI is a party and Mr. Gustafson did not previously participate personally and substantially while serving as an attorney for CEI or any other party. He will be allowed to participate in those specific party matters, including meetings or communications related to such cases where CEI is present. However, he will remain recused from those specific party matters in which his former client is a party if he had himself participated personally and substantially previously.

This limited waiver does not affect the application of any other provision of law, including any other provision of the Ethics Pledge; the Standards of Ethical conduct for Employees of the Executive Branch (5 C.F.R. Part 2635); or the criminal bribery, graft and conflict of interest statutes (18 U.S.C. §§ 201-209; or the Hatch Act (5 U.S.C. § 7323).



Scott F. Gast

Deputy Counsel and Deputy Assistant to the President

Dated: _____

6/17/2020